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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC.,
a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit entered August 8, 1962 (App. A) denying petitioners' motion for preliminary injunction pending appeal from an order of the United States District Court for the Northern District of Alabama,

Southern Division, which denied petitioners' motion for preliminary injunction (App. B).[1]

OPINIONS BELOW

The District Court issued a Memorandum on August 2, 1962 (R. 73-77, App. C) followed by Findings of Fact, Conclusions of Law and Order on August 3, 1962 (R. 78-82, App. B) denying petitioners' motion for preliminary injunction. Circuit Judge Gewin entered a temporary restraining order on August 3, 1962 (R. 101-103, App. D). On August 8, 1962, United States Circuit Judges Rives and Gewin denied petitioners' motion for injunction pending appeal but continued the restraint for three days (R. 150, App. A).

Thereafter, Mr. Justice Black extended the restraining order pending the filing of this petition for Writ of Certiorari (R. 155, App. E). This order was accompanied by a Memorandum (R. 151-154, App. F).

Later, on August 29, 1962, United States Circuit Judge Rives wrote to counsel stating that the Court of Appeals would pass on the merits of the appeal from the District Court as expeditiously as possible and would not defer such decision on the merits until disposition by this Court of this Petition for Writ of Certiorari (App. G).

At this writing, the Court of Appeals has not issued its decision on the merits. Meanwhile, petitioners are required by Mr. Justice Black's order to file this petition by September 16, 1962. It is likely that a decision on the merits may be forthcoming before this Court can

[1] The Appendix to this petition is referred to herein as "App." and the record certified from the courts below is referred to as "R". Petitioners were plaintiffs in the District Court.

dispose of this petition. Petitioners therefore propose to move for leave to supplement this Petition in order to bring up for review the Court of Appeals' decision on the merits of the appeal from the District Court if that decision is issued shortly and is adverse to petitioners. None of the aforementioned orders or decisions has been officially reported.

JURISDICTION

The order of the Court of Appeals denying petitioners' motion for a preliminary injunction pending appeal from the District Court was entered August 8, 1962 (R. 150, App. A). Mr. Justice Black's order directing petitioners' to file this petition within thirty (30) days was entered August 17, 1962 (App. E). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether the District Court possesses jurisdiction to prevent irreparable injury by ordering the maintenance of the *status quo* in a proceeding pending before the Interstate Commerce Commission, in which the railroads are about to make drastic rate reductions which the Commission suspended upon a finding of reason to believe the rate reductions unlawful, and where the Commission not only has been unable to pass upon their lawfulness with finality but is without power to further prevent the rate reductions from going into effect.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act (49 U.S.C. Section 1, et seq) are set forth in Appendix I.

STATEMENT

(a) The Proceedings in the Interstate Commerce Commission

In July 1961, Respondent Southern Railway Company, herein referred to as "Southern", published certain tariff schedules to be effective on August 7, 1961, proposing a new schedule of rail rates on grain from specified Ohio and Mississippi River ports to specified destinations in the Southeast and to intermediate points. The level of these new rates was about 35% of the existing rates. Other railroads, none of whom had any prior knowledge that Southern contemplated this action, immediately published similar rates in order to maintain the competitive position of grain shippers using their lines. Upon complaint, the Commission made a preliminary finding that there was reason to believe that the proposed rates would be unjust and unreasonable and would constitute an unfair competitive practice in contravention of the National Transportation Policy. It suspended the proposed rates for seven (7) months, the maximum period allowed by Section 15(7) of the Act.[2] The Commission then launched a broad investigation into the lawfulness of the proposed rates, and declared the proceedings to be of general transportation importance.[3] Hearings began on January 8, 1962. Meanwhile, Southern, because of delays occasioned by it, voluntarily extended the suspension period from March 9, 1962 to August 7, 1962. All other railroads concurred.

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[2] App. I. "Act" herein refers to the Interstate Commerce Act, 49 U.S.C. Section 1, et seq.

[3] The proceedings before the Commission are in ICC I & S Docket 7656—*Grain in Multiple Car Shipments, River Crossings to the South.*

Hearings before the Commission were still in progress on July 7, 1962, which, because of the statutory requirement of 30 days notice of the Commission's orders, was the last day the Commission could have prevented the rates from going into effect by ordering them cancelled. Protestants' prior motion that the Commission cancel the rates because of failure of Southern's testimony in chief to prove their lawfulness was denied on the ground that the Commission lacked power to consider such relief until the hearings were completed. Since the Commission was powerless to prevent the rates from going into effect on August 7, 1962, and since Southern was still presenting rebuttal evidence before the Commission, the barge lines and others requested Southern voluntarily to postpone the effective date of the rates until the Commission could issue a final order on their lawfulness. All other railroads agreed to such postponement provided Southern would agree. Southern refused.

(b) The Proceedings in the District Court

When it became clear that Southern would not voluntarily extend the effective date of the proposed rates, and while Southern was presenting rebuttal testimony before the Commission, petitioners on July 27, 1962, filed their verified complaint in District Court (R. 1-13), resting jurisdiction generally upon the diversity statute (28 U.S.C., Section 1332), as well as upon the federal question statute (28 U.S.C., Section 1331), and the law regulating commerce statute (28 U.S.C., Section 1337). The complaint, alleging irreparable injury and absence of adequate legal remedy, was accompanied by a motion that Southern and three other railroads be enjoined from placing the proposed rates into effect until the Commission entered a final

order in the investigation proceedings (R. 14-16). Supporting affidavits were filed showing that the proposed rates were so low that Arrow Transportation Company, a competing common carrier barge line, could not compete even if it moved the grain free, and that if the rates became effective, Arrow would be forced to surrender its common carrier certificate, causing irreparable injury to itself and to shippers and communities geared to its services (R. 45-64).

Southern promptly filed answer (R. 67-72), motion to dismiss (R. 65), and counter affidavits (R. 18-44). The other defendant railroads entered appearances but filed no responsive pleadings. Hearing was held in District Court on August 1, 1962, and on the next day the District Judge filed his Memorandum opinion stating that "the ends of justice would be best served by granting temporary injunctive relief" but that "I find myself powerless to grant the relief sought", without citing any reasons or authority for his lack of jurisdiction (R. 73-77, App. C). The following day, August 3, Findings of Fact, Conclusions of Law and Order were entered establishing requisite diversity and amount, jurisdiction of the parties, grave danger of irreparable injury, and absence of adequate legal remedy. He concluded, however, that he lacked jurisdiction to grant relief (R. 78-82, App. B). He denied, on jurisdictional grounds, petitioners' motion for a stay pending appeal (R. 85, App. H), and petitioners promptly appealed (R. 86).

(c) The Proceedings in the Court of Appeals

On the same day, August 3, 1962, petitioners applied for and, after hearing, obtained from United States Circuit Judge Gewin a temporary restraining

order, restraining Southern and the other three railroads from placing the proposed rates into effect before August 8, and fixing a $10,000 bond (R. 101-103, App. D). Only Southern opposed this relief. Petitioner's motion for an injunction to preserve the *status quo* pending appeal from the District Court was heard by United States Circuit Judges Rives and Gewin on August 8. Again Southern was the only railroad opposing the requested relief. Solely on jurisdictional grounds, and without citing authority, that Court denied the injunction pending appeal but extended the restraining order until August 11 to accord petitioners an opportunity to seek relief in this Court (R. 150, App. A).

(d) The Prior Proceedings in This Court

On August 10, petitioners petitioned this Court to extend the restraining order pending their filing this Petition for Writ of Certiorari. After Southern, with concurrence of all other railroads, voluntarily extended the effective date from August 11 to August 18, Mr. Justice Black on August 17 handed down his memorandum and order granting the relief prayed, allowing 30 days for the filing of this Petition and fixing the amount of the bond at $10,000 (R. 151-155 App. E, F).

(e) Further Proceedings in Court of Appeals

On August 27, Southern petitioned the Court of Appeals to require these petitioners to file a bond in the amount of $220,600.00 (R. 150-166). Petitioners answered on August 30 (R. 167-173); however, United States Circuit Judge Rives meanwhile wrote to the parties on August 29 stating that the Court of Appeals would decide the merits of the appeal promptly and

would defer hearing on the bond until after that decision, indicating that any further bond required might be in a prohibitive amount (App. G). At this writing, the Court of Appeals has not handed down its decision on the merits of the appeal from the District Court. It is expected momentarily.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' tentative determination that the District Court was without jurisdiction to prevent irreparable injury by maintaining the *status quo* of the proceedings before the Commission conflicts with the only two reported decisions in which similar relief was asked and granted. They are *Pacific Inland Tariff Bureau* v. *United States*, (D.C. Ore., 1955), 129 F. Supp. 472, and *Cantlay & Tanzola, Inc.* v. *United States*, (S.D. Cal., 1953), 115 F. Supp. 72, both being statutory 3-judge court decisions which were not appealed. Each case held that the Court possessed jurisdiction. No case to our knowledge has directly held that jurisdiction is lacking. This important question of federal law has not been but should be settled with finality by this Court. Unless it is settled, Southern will be free to cut rates so as to destroy barge competition and monopolize the traffic, thus emasculating the National Transportation Policy before the Commission can pass upon the lawfulness of the means used to accomplish it. The Commission and the Courts will be powerless to prevent such destruction. That this narrow but crucial question is presented in a case declared to be of general transportation importance warrants immediate settlement of this issue by this Court.

The Courts below apparently based their lack of jurisdiction on their interpretation that Section 15(7)

of the Act, by implication, ousted equity's jurisdiction to restrain unlawful and destructive reductions in rates which will inflict irreparable damage. If the Courts are powerless, common carriers will be free to engage at will in unlawful, monopolistic competitive practices, contrary to the public interest and to declared national policy.

ARGUMENT

I

The Writ Should be Granted to Prevent Defeat of the National Transportation Policy

The District Court made every finding necessary to grant the *status quo* injunction except jurisdiction of the subject matter. Specifically, it found requisite diversity and amount, irreparable injury, absence of adequate legal remedy, and that "the ends of justice would be best served by granting temporary injunctive relief." (R. 73-77, App. C). Southern has not appealed from those findings and we will not reargue those facets of the case. Suffice it to say that the rates proposed by Southern, if they become effective, will swiftly destroy barge movement of grain on the Tennessee River, a natural artery connecting the grain surplus area of the Midwest with the grain deficit area of the Southeast. It will do so because the rate reductions are so drastic the barge lines will be unable to compete in reaching many major Southeastern markets even if they haul the grain free.

If the Writ is denied, the rates will automatically go into effect before the Commission can pass upon their lawfulness. The unlawfulness of the rates will not be established until after irreparable injury has occurred

because the Commission decision is still months away.[4] Thus the National Transportation Policy, which directs preservation of the inherent advantages of all modes of transportation and denounces unfair or destructive competitive practices, will be defeated before the Commission can implement it.

National Transportation Policy, note preceding 49 U.S.C. Section 1 (App. I)

–*Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56 (1956)

I.C.C. v. *Mechling*, 330 U.S. 567 (1947)

See also: *Arrow Transportation Co.* v. *United States*, (N.D. Ala., 1959), 176 F. Supp. 411, *aff'd per curiam*, 361 U.S. 353 (1960).

What is involved is not a barge movement made noncompetitive by technological improvements in rail transportation, but a merciless attempt to destroy competition before the unlawfulness of the means used can be adjudicated. Granting the Writ is essential to the preservation of the integrity of the National Transportation Policy.

II

The Writ Should be Granted to Aid the Jurisdiction of the Commission

The Commission has made the essential preliminary findings and has exercised and exhausted its jurisdiction to prevent the rates from going into effect *pendente lite*. The seven month suspension power has been invoked and spent. Any future determination by the

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[4] Hearings were concluded August 29. Briefs are due November 5. There are 15,815 pages of transcript and 765 exhibits.

Commission that the rates are unlawful will be largely nugatory because many of the victims will have long since ceased to breathe. Judicial intervention to maintain the *status quo* will be in aid of the Commission's jurisdiction and will enable it to make an effective decision.

Scripps-Howard Radio, Inc. v. *Federal Communications Commission*, 316 U.S. 4 (1942)

Isbrandtsen Co. v. *United States*, (S.D. N.Y., 1948), 81 F. Supp. 544

West India Freight and Steamship Co. v. *Seatrain Lines*, (C.A. 2, 1948), 170 F. 2d 775

Pennsylvania Motor Truck Ass'n., et al., v. *Port of Philadelphia Marine Terminal Ass'n.*, (E.D. Pa., 1960), 183 F. Supp. 910

Amarillo-Borger Express v. *United States*, (N.D. Tex., 1956), 138 F. Supp. 411.

Note: 49 *Columbia Law Review*, 1124.

III

The Writ Should be Granted to Establish That Equity's Inherent Power to Restrain Destructive Rate Practices, Preventing Irreparable Injury, Survived Enactment of Section 15(7) of the Interstate Commerce Act

Federal equity courts possess inherent power to prevent irreparable injury by restraining railroads from engaging in destructive rate practices. They possessed this power before the Act was adopted.

In *Northern Pacific Ry. Co.* v. *Pacific Coast Lumber Mfrs. Ass'n.*, (C.A. 9, 1908), 165 Fed. 1, 5, the court said:

> "Prior to its [Interstate Commerce Act] enactment, the equitable jurisdiction to enjoin excessive charges and discriminations by common carriers

on the ground that the wrong was a constantly recurring one, for which there was no adequate remedy at law, was generally recognized (citing cases)." Accord: *Coe & Wilson* v. *L. & N. R.R. Co.* (M.D. Tenn., 1880), 3 Fed. 775; *Menacho* v. *Ward* (S.D. N.Y., 1886), 27 Fed. 529.

They possessed this power after the Act was enacted giving the Commission primary jurisdiction over rate matters, *provided* such judicial intervention did not interfere with or frustrate the Commission's primary jurisdiction.

In *Northern Pacific Ry. Co., supra*, the court said:

> "The exercise of that power does not invade the province of the Interstate Commerce Commission. It prohibits the enforcement of an alleged unreasonable rate only until the Commission shall have had time and opportunity to adjudge the question of its unreasonableness. *Such has been the decision of the federal courts in every case in which the question has arisen.*" [p. 8 emphasis added].

Accord: *Tift* v. *Southern Ry. Co.*, (S.D. Ga., 1903), 123 Fed. 789, *aff'd*, 206 U.S. 428

Jewett Bros. & Jewett v. *Chicago, M. & St. P. Ry.*, (D.C. S.D. 1907), 156 Fed. 160

M. C. Kiser Co. v. *Central of Ga. Ry. Co.*, (N.D. Ga., 1907), 158 Fed. 193

United States v. *Michigan Central R. Co.*, (N.D. Ill., 1903), 122 Fed. 544

Northern Pacific Ry. Co. v. *Pacific Coast Lumber Mfrs. Ass'n., supra*

Union Pacific R. Co. v. *Oregon and Washington Lumber Mfrs. Ass'n.*, (C.A. 9, 1908), 165 Fed. 13.

Contra: *Houston Coal and Coke Co.* v. *Norfolk & Western Ry.*, (C.C. Va. 1909), 171 Fed. 723

Wickwire Steel Co. v. *N. Y. Central, etc., R. Co.*, (C.A. 2, 1910), 181 Fed. 316

Atlantic Coast Line v. *Macon Grocery Co.*, (C.A. 5, 1909), 166 Fed. 206, [Circuit Judge Shelby dissenting], *aff'd on other grounds*, 215 U.S. 501.

This equity power survived the enactment of the Mann-Elkins Act (June 18, 1910, c. 309, sec. 12, 36 Stat. 551), which first vested the Commission with suspension authority, and the Transportation Act of 1920 (Feb. 28, 1920, c. 91, sec. 418, 41 Stat. 484), which added to Section 15(7) a statutory remedy for persons damaged by *increases* in rates but provided no remedy for persons irreparably injured by *decreases* in rates made effective at the end of the suspension period and later declared unlawful.

IV

The Writ Should be Granted to Protect Petitioners' Property from Being Taken Without Due Process of Law

A business or occupation is property within the protection of the due process clause, *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 111 (1928); *Frost* v. *Corporation Comm'n.*, 278 U.S. 515, 519-20 (1929).

If equity cannot enjoin unlawful rate decreases after the Commission has exercised and exhausted its jurisdiction to suspend the rates *pendente lite*, petitioners' businesses will be destroyed without administrative or judicial adjudication of the lawfulness of the means used in such destruction. The Act should not be construed so as to raise these grave constitutional difficulties.

Oklahoma Natural Gas Co. v. *Russell*, 261 U.S. 290, 293 (1923)

Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U.S. 196, 201, 204-05 (1924)

Anniston Manufacturing Co. v. *Davis*, 301 U.S. 337, 351-352 (1937)

Pacific Inland Tariff Bureau v. *United States*, *supra*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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